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Court of Appeals
Division II
State of Washington
5/31/2019 1:23 PM

NO. 51930-5-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON
Respondent

v.

DHENA RAYNE ALBERT
Appellant

THE HONORABLE JUDGE ROBERT LEWIS
JUDGE OF THE SUPERIOR COURT
OF CLARK COUNTY, STATE OF WASHINGTON

APPELLANT'S RESPONSE BRIEF

JAMES J. SOWDER
Attorney for Appellant
1600 Daniels Street
P. O. Box 27
Vancouver, WA 98666
(360) 695-4792
WSBA #9072

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A. APPELLANT'S RESPONSE TO RESPONDENT'S BRIEF

As to respondent's Footnote No. 1, appellant will agree her assignments of errors are 1-9 (pages 1-2). There are no assignments of errors no(s) 12, 13, and 14 as referred to on page 9. Assignment of errors no(s) 12, 13, and 14 were not stated or briefed.

As to respondent's Footnote No. 2, it is obvious from Appellant's "motion to seal declarations of the defendant for in camera review; obtain sealed records documenting CRI's allegation; if no documentation defendant requests a Franks hearing" that she was asking for disclosure of the informant's record and disclosure of the informant. The motion and hearing provided evidence in the appellant's declaration and cell phone records that she was not at the residence being searched for substantial periods of time within the last 72 hours prior to the execution of the warrant. As a result, the informant could not have seen appellant as claimed and could not have purchased controlled substances from her.

Appellants motion (CP 49, line 16) sought to disclosure records as to the officer's observations of the informant to test his/her veracity (RP 33-34). There was no waiver of disclosure of the informant as respondent argues in Footnote 2.

As to respondent's position that the trial court properly denied appellant's request for disclosure of the informant and/or in-camera review, appellant maintains failure to do so was an abuse of discretion. The trial court read too

narrowly the case law in this area to only allow in-camera interview or disclosure on a showing the affiant was untruthful or acted in reckless disregard of the truth (respondent's brief at page 8, last paragraph).

State v. Harris, 44 Wn. App. 401 (1986) denied a request to disclose an informant because the defendant provided evidence material only concerning the credibility of the informant (State v. Harris, at page 406). However, on the same page at the top, the court stated the case for disclosure is much stronger when likely identifying the informant will be helpful in the determination of guilt or innocence. Appellant did not simply give evidence attacking the informant's credibility she provided evidence that would have established she was not at the residence for substantial periods of time and that is helpful to show she was not in possession of the controlled substance. Particularly since her male roommate was there and had possession and control over the residence and the contraband. David Tovar was charged in the original and amended information as having possession of cocaine, altering the identification of a firearm, possession of a dangerous weapon and bail jump. He was not appellant's roommate. Mr. Tovar and the roommate's presence in the residence make disclosure or in-camera interview of the informant helpful in the determination of her guilt or innocence by allowing her the opportunity to show others had access and control of the controlled substance. It is for the trier of fact to determine who has dominion and

control so the state cannot control that evidence by its filing decision or from relying on the affiant's statements he chooses to put in the search warrant.

State v. White, 50 Wn. App. 858 (1988) noted at page 865, disclosure of the informant may be ordered when necessary to assess the affiant's credibility or accuracy. This is because if the information is kept secret the defendant lacks access to the very information Franks requires; which is to show affiant was not truthful or acted in reckless disregard for the truth (White at page 864).

State v. Casal, 103 Wn.2d 812 (1985) held there is no general rule of non-disclosure of the identity of the informant on the issue of probable cause. Disclosure may be allowed where deemed necessary to assess the affiant's credibility or accuracy. The trial court can do an in-camera ex parte hearing to assist defendant in seeking secret evidence that may assist the defendant in making the substantial preliminary showing required for Franks to obtain a preliminary hearing, Casal at page 819.

The standard of review is abuse of discretion. Trial court abuses discretion if its decision is manifestly unreasonable or relies on facts unsupported by the record or was reached by applying the wrong legal standard, State v. Curry, ___ Wn.2d ___ (No. 94681-7, 2018).

In appellant's case the trial court applied the wrong legal standard in ruling the only issue was the credibility of the affiant. This is too narrow reading

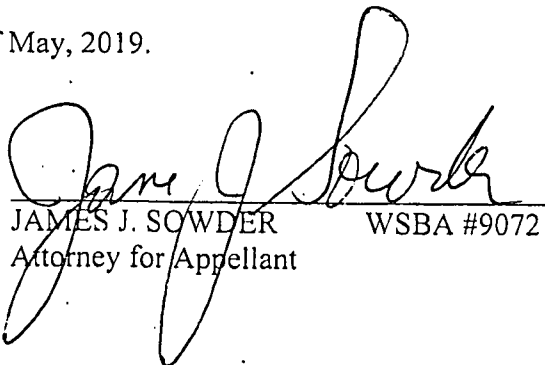
of the above noted informant disclosure and in-camera review cases. The trial court's ruling was manifestly unreasonable to give no weight to appellant's absence from the residence.

As to respondent's argument concerning the late disclosure of the surveillance video after close of the state's case, after appellant's witnesses had testified and appellant was about to testify. Appellant made cognizable argument for relief on a very unusual circumstance. Appellant requested a continuance to obtain the video recording it had requested from the state many times before trial (page 6-7 of Appellant's brief). The trial court denied the continuance even though the state did not oppose. If trial counsel had this discovery pretrial, different decisions would have been made about going to trial and/or accepting the plea offer. With this late discovery, trial counsel's ability to provide effective assistance of counsel was compromised. If defense counsel asked for a mistrial it would only result in the damaging video evidence being admitted at a later trial. The trial court had ruled it was not admissible in the present case unless appellant testifies in such a manner that the video becomes relevant for impeachment evidence. The appellant's case was set up for trial based on the non-existence of the video showing her sitting next to approximately one ounce of methamphetamine in packages that looked like an item admitted into evidence. The late discovery created ineffective assistance of counsel.

APPELLANT'S RESPONSE 4

In State v Drath, cited in appellant's brief (at page 14), the court crafted a remedy by allowing the defendant to take a plea offer that had been previously rejected because of incorrect advice of the standard range. Allowing appellant to take the plea offer previously made to correct an ineffective assistance of counsel error is recognized as an appropriate remedy. Additionally, none of this would have happened if the trial court had not abused its discretion in denying a continuance requested by appellant and not opposed by respondent. It was manifestly unreasonable to deny a continuance when potentially critical evidence was still undiscovered in the state's hand.

DATED this 31 day of May, 2019.


JAMES J. SOWDER WSBA #9072
Attorney for Appellant

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,)	
)	NO. 51930-5-II
Respondent,)	
)	DECLARATION OF SERVICE
v.)	
)	
DHENA RAYNE ALBERT,)	
)	
<u>Appellant.</u>)	

I, REBA D. GRAHAM, certify and declare under penalty of perjury under the laws of the State of Washington, that on the 31st day of May, 2019, I personally e-filed the Appellant's Response to the Clerk of the Court, Court of Appeals, as well as a copy of this declaration of service; I emailed a copy of same to the Clark County Prosecuting Attorney Aaron Bartlett and mailed a copy to Appellant at the below listed address.

Dhena Albert, DOC #366486
Washington Corrections Center for Women
9601 Bujacich Rd. NW
Gig Harbor, WA 98332-8300

DATED this 31st day of May, 2019.


REBA D. GRAHAM, Legal Assistant
JAMES J. SOWDER WSBA #9072

DECLARATION OF SERVICE

JAMES J. SOWDER

May 31, 2019 - 1:23 PM

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Superior Court Case Number: 17-1-01893-7

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Address:
1600 Daniels Street
PO Box 27
Vancouver, WA, 98666
Phone: (360) 695-4792

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JAMES J. SOWDER

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Address:
1600 Daniels Street
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